

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**SUE J. ERPS AND WILLIAM G. ERPS,
d/b/a IMPROVEMENTS UNLIMITED,**

APPELLANTS

VS.

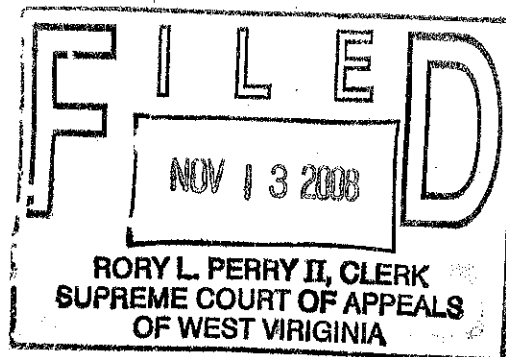
NO.: 34262

**WEST HUMAN RIGHTS COMMISSION
and VICTOR T. PEOPLES,**

APPELLEES,

**FROM THE WEST VIRGINIA HUMAN RIGHTS COMMISSION
[CASE NUMBER BELOW ER-71-05]**

REPLY BRIEF OF APPELLANTS



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REPLY

The appellants will address certain points and arguments posed by the Appellees in their brief in the same order presented.

1. ERROR IN AWARDING BACK PAY

The Unambiguous Testimony of Mr. Peoples

The Commission and Mr. Peoples argue that Mr. and Mrs. Erps have misread a single "ambiguous portion" of the transcript. This is incorrect. The portion of the transcript relied upon by the Erps was testimony of Mr. Peoples which was induced by the Assistant Attorney General. When the Assistant Attorney General asked Mr. Peoples when he was medically unable to work as a laborer, Mr. Peoples responded by saying, "When did I file. Um, maybe March 2005." *The assistant Attorney General then asked a question to clarify any possible ambiguity: "But up until that time you were able to do laborer work?"* to which Mr. Peoples replied "**Yes Sir.**" There is nothing that is ambiguous about the testimony of Mr. Peoples on this point.

As it turns out from the production of an ex parte document, Mr. Peoples did file for total disability in March of 2005, and claimed that he was unable to work in March of 2005; he could not have filed in March of 2005 claiming total disability without some medical evidence to support it. This fact illustrates the prejudice to Mr. and Mrs. Erps from Mr. Peoples' refusal to authorize the production of the Veterans' Administration records which would have revealed the medical documentation to support Mr. Peoples' claim that he could not work as a laborer in March 2005. The fact that the Veterans' Administration did not totally disable him does not eradicate the fact that he was not able to work as a **laborer** at least as early as March of 2005.

Mitigation of Damages

The Commission and Mr. Peoples next argue that Mr. Peoples had no duty to return to work when requested to do so by Mr. Erps. This argument is stunning for two reasons: (1) if Mr. Peoples had been physically able to return to work when the decision was rendered, the Commission would have ORDERED Mr. Peoples to be reinstated to his position (claiming, of course, a huge back pay award) and (2) Mr. Erps instructed Mr. Peoples to return to the shop the very next morning where he would have been placed on a separate crew with a different supervisor.

Mr. Peoples called Mr. Erps from his home on the very day of the event (Mr. Erps was in another county at another job site) and Mr. Erps appropriately responded to Mr. Peoples by instructing him to return to the shop the next morning, that he (Mr. Erps) would take care of the situation, and by confirming that Mr. Bragg should not have called him the "N" word. Furthermore, Mr. Peoples returned to Mr. Erps' shop twice after that communication to receive paychecks, and Mr. Erps twice requested the opportunity to speak to Mr. Peoples so that he could place him at work on a separate crew. On three separate occasions with direct communication to Mr. Peoples, Mr. Erps made every effort to resolve the circumstances and the statement by the Administrative Law Judge that Mr. Erps did not attempt to contact Mr. Peoples at home or by letter is of no significance; three direct communications to Mr. Peoples (one by phone and two in person) was more than sufficient.

Failure to sign the authorization for the Veterans' Administration Records

The Commission and Mr. Peoples argue that Mr. Peoples' refusal to sign the authorization to obtain the desperately needed records from the Veterans' Administration was of no consequence and Mr. Peoples received limited back pay

damages in spite of his refusal to produce the authorization. This argument fails for obvious reasons.

First of all, the Administrative Law Judge and the Commission awarded damages to Mr. Peoples from March of 2005 through December of 2005 which was a nine (9) month period beyond which Mr. Peoples stated to the Veterans' Administration that he was totally disabled; it is also the same nine (9) month period after which Mr. Peoples *testified* that he was no longer able to work as a laborer. Had the authorization been signed as ordered by the Administrative Law Judge, the medical records and application of Mr. Peoples would have been produced and put into evidence ***which would have substantiated that he was not able to work as a laborer at least as early as March of 2005.*** Mr. and Mrs. Erps have clearly been prejudiced by the refusal of Mr. Peoples to sign the authorization and produce the very records that the Administrative Law Judge acknowledged was essential for a proper determination of damages.

Furthermore, it was established that Mr. Peoples had received a ***partial disability award*** from the Veterans Administration in August of 2004, just two months after his last employment with Mr. and Mrs. Erps. Frankly, the documentation which would have been produced by the authorization would likely have substantiated that Mr. Peoples could not work as a laborer as early as August of 2004!

It was clearly erroneous for the Administrative Law Judge to declare in an order that certain records were essential to a proper determination of damages, and then permit Mr. Peoples, the party seeking the damages, to refuse to comply with the order, with the same Administrative Law Judge then awarding back pay damages even beyond that date when Mr. Peoples testified that he could no longer work as a laborer.

Ex Parte production of documents

Last, the Commission and Mr. Peoples argue that the production of the first page of a ruling by the Veteran's Administration ex-parte to the Administrative Law Judge is a "red herring." Is the ex parte production of a document to a forum that is relied upon by that forum ever a "red herring?" *The documentation was produced ex parte by Mr. Peoples to the Administrative Law Judge long before there was any request for records from the Veterans' Administration by use of subpoena or authorization.* The issue is that the Administrative Law Judge relied on the front page of a Veterans' Administration ruling produced ex parte without forcing Mr. Peoples to produce all of the other records from the Veterans' Administration, including records that Mr. Peoples was medically unable to work as a laborer. As it has previously been argued, it may very well be that the Veterans' Administration was correct in determining that Mr. Peoples was not totally disabled, ***but the medical records would support that he was not able to work as a laborer, just as Mr. Peoples testified under examination by the Assistant Attorney General.*** Consequently, after receiving the first page of a ruling from the Veterans Administration ex parte from Mr. Peoples, the Administrative Law Judge determined that it was essential for a proper determination of back pay to receive ***all*** of the records from the Veterans' Administration; although Mr. Peoples refused to produce the authorization to obtain those essential documents so that a proper award of back pay could be determined, the Administrative Law Judge and the Commission then relied on the ex parte document in awarding damages to Mr. Peoples for nine (9) months beyond the date in which he testified he could no longer work as a laborer. This argument is no "red herring."

2. RETALIATORY DISCHARGE

The appellants acknowledge that under the doctrine of *respondeat superior* an employer may be liable to an employee as a result of unlawful actions of a supervisor, but the doctrine also applies when an employer offers **credible evidence** of a legitimate, nondiscriminatory reason for the action pursuant to the doctrine in West Virginia DNR v. Myers, 191 W.Va. 72, 443 S.E.2d 229 @ 233 (1994).

The Administrative Law Judge acknowledged that the supervisor (Mr. Yontz) was trained on how to handle hostile, angry youth at the Western Teen Challenge center and she acknowledged that the supervisor used his training "to separate the men and instruct them to return to work." (ALJ Finding of Fact, 27). The supervisor was confronted with two hostile, angry men (Mr. Peoples and Mr. Bragg), with access to tools which could impose severe personal bodily injury to either or both men and/or the supervisor. In defusing this dangerous situation, the supervisor did not attempt to impose discipline upon either or both men in their rage and anger at a moment when they were not receptive to receiving discipline, but instead, the supervisor chose to instruct both men to return to work so that the immediate threat of physical violence would dissipate. *This was not an unreasonable request by the supervisor, and Mr. Peoples' insistence that Mr. Bragg be immediately disciplined in his state of anger and hostility that existed at that moment was not only unwarranted, but it was clearly unreasonable.* One can only imagine the potential physical altercation that would have erupted had the supervisor, under overt insistence from Mr. Peoples, imposed discipline upon Mr. Bragg who had also been verbally abused by Mr. Peoples with name calling and statements about his speech impediment.

3. RACIALLY HOSTILE ENVIRONMENT

The appellants have not misapplied the law. This Court has established that in a hostile environment harassment case, liability will generally not be imposed unless there is a significant accumulation of incidents. Kalany v. Campbell, 220 W.Va. 50, 640 S.E.2d 113 (2006); Hanlon v. Chambers, 195 W.Va. 99, 464 S.E. 2d 741 (1995).

Mr. and Mrs. Erps do not dispute that the more severe the conduct, there will be less frequency required to impose liability. Fairmont Specialty Services v. West Virginia Human Rights Commission, 206 W.Va. 86, 522 S.E.2d 180, @ fn 8 (1999). Nevertheless, there must be some frequency; there must be more than one event. The event at issue in this case was the only event for Mr. and Mrs. Erps in over thirty (30) years in the construction business. For an employer to be guilty of fostering some racially hostile environment, the employer must be put on notice that there is some racial hostility, but there are no facts to substantiate that Mr. and Mrs. Erps were aware of any racially motivated hostility prior to the event at issue in this case.

In addition to the above, it is obvious that when Mr. Erps became aware of the event at issue, he acted promptly and appropriately. He took statements on the very evening of the event, consulted with and admonished the co-worker (Mr. Bragg) who made the improper statement, and requested Mr. Peoples to return to work where he would have been placed on a totally separate crew. Even Mr. Peoples acknowledged that Mr. Erps told him that the co-worker should not have made the statement and that he (Mr. Erps) would take care of the situation. In addition to the total lack of any frequency, the undisputed action taken by Mr. Erps corroborates his policy to not foster a racially hostile work environment.

4. RETALIATION FOR FILING A CLAIM

The Commission and Administrative Law Judge permitted inadmissible hearsay testimony of Mr. Peoples to substantiate a claim for retaliation; that inadmissible hearsay testimony was directly refuted by Mr. Erps. Furthermore, the Commission and the Administrative Law Judge concluded that alleged harassment by someone other than Mr. and Mrs. Erps and their employees was a legal basis to substantiate retaliation. Incredible claims against Claude Erps, a separate employer unconnected with William Erps and his wife, legally has no bearing on the claim filed by Mr. Peoples against William Erps. Finally, the Commission and the Administrative Law Judge concluded that Mr. Peoples' "feelings" that he was being followed and chased by Mr. Erps and his employees (without any proof of same) provided a legal basis to support retaliation against Mr. Peoples.

As a matter of law, inadmissible hearsay testimony, alleged harassment by people unconnected with the employer, and mere "feelings" do not legally sustain retaliation for filing a claim.

5. GENERAL DAMAGES

The Commission and Mr. Peoples essentially evade the points raised by Mr. and Mrs. Erps in their brief regarding this issue. Clearly, Mr. Peoples was not so embarrassed on June 16, 2004, that he went home and immediately called the Commission because he did not call the Commission until one week later. In fact, he called Mr. Erps when he arrived at home on June 16, 2004, and Mr. Erps advised him that he would take care of the situation and instructed Mr. Peoples to return to the shop the next morning.

The only evidence of embarrassment and humiliation was from questioning by the Administrative Law Judge who asked Mr. Peoples what the "N" word meant to him. Mr. Peoples did not testify that he was embarrassed or humiliated because he was discharged. In the absence of such evidence, the claim for general damages fails.

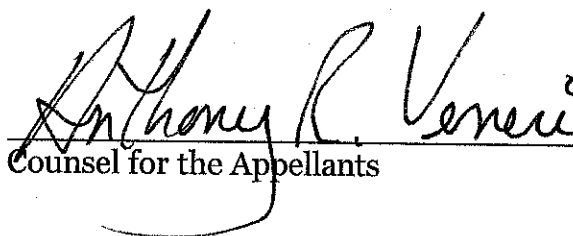
REQUEST

The Appellants, William G. Erps and Sue Erps, d/b/a Improvements Unlimited, request this Court to **reverse** the decision of the Human Rights Commission and Administrative Law Judge in all respects, and enter judgment in favor of William G. Erps and Sue Erps, d/b/a Improvements Unlimited.

Respectfully submitted,

SUE J. ERPS and WILLIAM G. ERPS,
d/b/a IMPROVEMENTS UNLIMITED

By Counsel.


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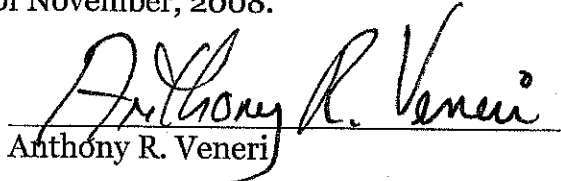
CERTIFICATE OF SERVICE

I, ANTHONY R. VENERI, ESQ., Counsel for the Petitioners, do hereby certify that I have this day served a true copy of the foregoing **REPLY BRIEF OF APPELLANTS** upon Ivin B. Lee, Executive Director of the West Virginia Human Rights Commission, and upon Paul Sheridan, Esq., Assistant Attorney General, by placing same in the United States Mail, postage paid, addressed as follows:

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Dated this 12th day of November, 2008.


Anthony R. Veneri